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TRANSCRIPT OF PROCEEDINGS

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

IN THE MATTER OF:

EB DOCKET NO. 04-381

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., ET AL.

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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PRE-HEARING CONFERENCE

+ + + + +

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IN THE MATTER OF: :  
: :  
FLORIDA CABLE :  
TELECOMMUNICATIONS :  
ASSOCIATION, INC.; :  
COMCAST CABLEVISION OF :  
PANAMA CITY, INC.; :  
MEDIACOM SOUTHEAST, :  
L.L.C.; and COX :  
COMMUNICATIONS GULF COAST, : EB Docket No. 04-381  
L.L.C. :  
Complainants, :  
: :  
v. :  
: :  
GULF POWER COMPANY, :  
: :  
Respondent. :  
-----X

Monday,  
January 31, 2005

VOLUME 2

Washington, D.C.

The above-entitled matter came on for  
hearing at 10:00 a.m.

BEFORE: RICHARD L. SIPPEL,  
Chief Administrative Law Judge

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E-H-I-B-I-T-S

AgencyExhibit Nos.DocumentPageGulf Power Plates  
C-1 through C-9

Start Time: 10:03 a.m.

End Time: 11:03 a.m.

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P-R-O-C-E-E-D-I-N-G-S

(10:03 a.m.)

JUDGE SIPPEL: Okay. We're on the record. The second pre-hearing conference. I'm assuming that everybody -- all the counsel has identified themselves to the Reporter. I don't need to take attendance orally today. But if you haven't, be sure you do before you leave.

And I'll be -- I guess I'll be working primarily with Mr. Langley, Mr. Seiver, and I'm not sure who is going to be speaking for the Bureau but I do have some questions for the Bureau.

Mr. Shook, good morning.

MR. SHOOK: Good morning.

JUDGE SIPPEL: Ms. Griffin? Ms. Griffin is not here.

MS. LIEN: I'm sorry?

JUDGE SIPPEL: Who is here? Who else is here?

MS. LIEN: Lisa Griffin was not able to attend. She had a conflict.

JUDGE SIPPEL: That's what I -- okay. All

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1 right.

2 Let's see. I've got -- I think the place  
3 to start is with the additional agenda of Gulf Power.  
4 And the status report on the -- well, really, I don't  
5 have a formal report --but the status of this possible  
6 survey, pole survey.

7 You raise a question on your proposed  
8 additional agenda whether Complainants are due to  
9 produce documents from other association members,  
10 other than those that are named in the -- who are  
11 actually parties to this proceeding, right? We have  
12 the association and then the four cable companies who  
13 are the parties.

14 MR. SEIVER: Yes, Your Honor, that's  
15 right.

16 JUDGE SIPPEL: In terms of representing  
17 the association, how much do you claim that the  
18 association -- the members of the association are  
19 bound by what is determined here or -- in which case,  
20 do you intend to turn over -- what is your position  
21 with respect to their discoverability?

22 MR. SEIVER: Well, Your Honor, it is my

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1 understanding the only members of the association that  
2 are on Gulf Power's poles are named in the complaint.

3 So there are no other, that I understand,  
4 members that are sitting around somewhere with some  
5 other documents that are part of our association that  
6 are on Gulf Power's poles.

7 JUDGE SIPPEL: All right. And let Mr.  
8 Langley respond to that.

9 MR. LANGLEY: I was under the impression  
10 that Time Warner and Adelphia were FCTA members. But  
11 I could be wrong about that. And you all would  
12 certainly know better than I would.

13 MR. JOSEF: Your Honor, that is correct.  
14 Time Warner and Adelphia are -- our information from  
15 them are that their systems at issue are not attached  
16 to Gulf Power poles to their knowledge.

17 JUDGE SIPPEL: We don't have any  
18 information to the contrary?

19 MR. JOSEF: We do not have any  
20 information.

21 JUDGE SIPPEL: And you don't -- you're not  
22 really sure. I mean you don't have any specific

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1 information about this?

2 MR. LANGLEY: No, we're pretty sure  
3 Adelphia and Time Warner are attached to some of our  
4 poles.

5 MR. SEIVER: Well, maybe we can clear this  
6 up. I think Brighthouse is a successor to Time  
7 Warner. And didn't we have them moved in --

8 MR. JOSEF: Correct.

9 MR. SEIVER: -- to the case?

10 MR. JOSEF: Correct. Time Warner joined  
11 the case in the underlying proceeding.

12 MR. SEIVER: And then Brighthouse now has  
13 both attachments. And so they're a named complainant.

14 MR. LANGLEY: Do you all know about  
15 Adelphia?

16 MR. JOSEF: We followed up with Adelphia.  
17 And they indicated that to their knowledge, they are  
18 not attached to Gulf Power poles.

19 MR. LANGLEY: Okay. This is something we  
20 could probably --

21 JUDGE SIPPEL: I think so.

22 MR. LANGLEY: -- work out --

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1 JUDGE SIPPEL: I think so.

2 MR. LANGLEY: -- among ourselves.

3 JUDGE SIPPEL: All right. Let's more on.  
4 That's a -- I'm going to expect to hear from you in  
5 the next 30 days with respect to the certainty of the  
6 parties.

7 Now -- then you say whether in light of  
8 the estimated time for the consultant, et cetera,  
9 whether the interest of the judge would be best served  
10 by a temporary stay or revision of the procedural  
11 deadlines. I certainly didn't contemplate any stay in  
12 the real sense of the world.

13 But there still are questions. There are  
14 really two sets of questions. One set of questions  
15 that is evidentiary in nature are the questions of the  
16 poles, the counting of the poles, which you contend  
17 would be full capacity, that is which Gulf Power  
18 contends would be the full capacity. And thus my  
19 suggestion that there be a survey.

20 However, the burden of proof is with Gulf  
21 Power. And I don't want to suggest that because I  
22 came up with an idea that I thought was pretty good

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1       that that is necessarily going to meet your burden of  
2       proof.

3               If you have some better way of getting at  
4       this or some -- well, I'm going to get to something  
5       very specific on this that you've mentioned in one of  
6       your filings before the case before me. But in any  
7       event, it's up to you.

8               You can decide on your own that you're not  
9       going to do the survey. You don't think a survey is  
10      necessary. The problem with that might be -- or the  
11      way -- that's what you're going to be stuck with when  
12      we have the hearing, when, you know, we start the  
13      hearing.

14              So you're going to have to make that  
15      assessment as you go along. But I certainly want to  
16      see serious discovery underway while the other issues  
17      are being explored. And I'll get to the other issues  
18      in just a minute because I don't think that we  
19      resolved "other issues" at the last session. We  
20      raised a lot of them.

21              Now let me tell you specifically what I  
22      have in mind -- so I'm not going to stay the

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1 proceedings. I will hear argument with respect to  
2 dates.

3 But in light of the history of this case,  
4 the damages issue has been before this Commission for  
5 I think I've seen it over a year before it came to me  
6 -- that -- now it's not the damages issue, of course,  
7 not the damages issue of the Eleventh Circuit. It  
8 didn't start out that way anyway.

9 But you have had this before you came --  
10 before the case was set for hearing for a considerable  
11 period of time. And you did have an opportunity to  
12 develop a lot of this evidence.

13 So to just let this hearing become an  
14 exercise in putting information together that should  
15 have been available at the time this hearing was  
16 commenced at least in large part -- now I'm very  
17 reluctant to move too much on a hearing schedule.

18 In other words, let me come to it another  
19 way. I'm giving you over a year to get ready for a  
20 hearing. And it would seem to me that that is a  
21 reasonable period of time. Now how we adjust the time  
22 within that year frame and move things maybe a month

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1 here or month there, I'm open to discussion on that.

2 That's my thinking coming into this  
3 meeting this morning. So you're going to have a  
4 burden of convincing me otherwise.

5 Let me get to the nub of what I think,  
6 though, is a concern with respect to the survey. And  
7 that is you filed a -- at the request of -- or at the  
8 direction of the Bureau, you filed a statement of what  
9 your -- a declaration of what your evidence was going  
10 to be. And that was back sometime December of 2003.  
11 Wasn't it? Or was it --

12 MR. LANGLEY: It was January --

13 JUDGE SIPPEL: January --

14 MR. LANGLEY: of '04.

15 JUDGE SIPPEL: -- '04, January of last  
16 year. All right. So it's almost a year ago.

17 And in there, you make the comment that  
18 Gulf Power does not know how the Commission intends to  
19 interpret the Eleventh Circuit's tests, in your second  
20 page, which, I guess, in a sense you feel is kind of  
21 putting you at a disadvantage.

22 You don't know what the standard is that

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1 you have to meet. You've got the burden of meeting  
2 the standard that was enunciated by the Eleventh  
3 Circuit. I mean that's the long and short of what the  
4 hearing designation order says.

5 Now I'm going to ask both sides to try,  
6 and particularly the Bureau, to explain to me how, you  
7 know, how is this going to be resolved short of a full  
8 evidentiary hearing and submission of findings and all  
9 that type of thing.

10 MR. LANGLEY: May I speak?

11 JUDGE SIPPEL: Please do.

12 MR. LANGLEY: I think at the last pre-  
13 hearing conference, Your Honor answered one of the  
14 most important questions and that is how is this  
15 evidentiary burden going to be interpreted.

16 Gulf Power had hoped that statistical  
17 evidence might be appropriate and satisfy the burden  
18 but we understood, Your Honor, at the last hearing to  
19 interpret the per-pole evidentiary showing very  
20 strictly.

21 And for that reason, the survey that Your  
22 Honor has proposed makes more sense to us because

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1 quite frankly I think we would have a difficult time  
2 making a per-pole showing based on the documents and  
3 information currently in our possession.

4 Now the facilities maps that were turned  
5 over by the Complainants in mid-January will advance  
6 us towards that goal. But actually making a per-pole  
7 showing for each unique pole is something that I do  
8 not think we could have done prior to them turning  
9 over the facilities maps or even prior to conducting  
10 the survey which, by the way, we are going to do.

11 And we are, I believe, going to decide on  
12 the three bids that we have received today and  
13 actually get that consultant started.

14 JUDGE SIPPEL: Well, is there anybody here  
15 that disagrees with that approach? Or thinks that  
16 there is some element a lacking of common sense to  
17 this? I thought I read that language very clearly  
18 from the Commission's designation order. And what  
19 preceded, the Eleventh Circuit and the Commission  
20 order based on the Eleventh Circuit.

21 But go ahead. I mean here's your chance.

22 MR. SEIVER: Thank you, Your Honor.

1 I asked to copy out some diagrams from the  
2 back of the pole attachment agreement that was part of  
3 the complaint in this so I could make my point,  
4 perhaps, a little bit clearer to Your Honor. And then  
5 I had them made a little bit larger just so I could  
6 show them.

7 Our biggest problem has been all along, I  
8 think, an issue as to what was described as relevant  
9 evidence and what is relevant under the test. And one  
10 of the big issues that we've had is trying to define  
11 the legal terms full capacity, which I had asked, Your  
12 Honor, on clarification and also what's the  
13 relationship between the marginal costs and the cable  
14 rate formula.

15 So our concern had been that as we embark  
16 on a survey of all these poles that might be in the  
17 area. As Your Honor noted, we thought that something  
18 like that should have been in existence at the time  
19 the description of evidence was submitted so it's kind  
20 of -- we're scratching our heads now.

21 We gave them all our documents. That's a  
22 start. Now they're going to do a survey. And then

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1 they're going to come up with evidence today that  
2 would somehow or other show that a pole was crowded  
3 five years ago.

4 And that being a problem for us, we wanted  
5 to at least show one other issue that comes up in  
6 this. For example, if Your Honor would look at Plate  
7 C-2, if we have -

8 JUDGE SIPPEL: Can we get a copy of these  
9 with the transcript?

10 MR. SEIVER: Yes.

11 COURT REPORTER: Yes. That's provided.

12 JUDGE SIPPEL: Thank you.

13 MR. SEIVER: And if we look at Plate C-2,  
14 Your Honor, you'll see that if we have a study --  
15 let's say a survey of the poles, for example, and you  
16 see at the top there's the GPC cable or neutral, and  
17 it comes across and do you see the little -- they call  
18 that a drip loop that goes underneath the attachment  
19 and goes across. And they measure A, that distance of  
20 40 inches down to where the cable TV wire are.

21 In a situation where that drip loop hangs  
22 down lower, if you have the cable TV wires where they

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1 are, then all of a sudden A, it's constricted and it's  
2 out of code. And the pole is beyond capacity just  
3 because those wires drip some.

4 And our concern was is that if an analysis  
5 is done of the poles and they say hey, cable is too  
6 close to the power unless on a particular pole it is  
7 analyzed as to whether that drip loop is done properly  
8 and/or whether it would make sense to have the drip  
9 loop lifted rather than either kick everybody off the  
10 pole or make us pay additional money or change out the  
11 pole to a taller pole, we're never going to really get  
12 to the answer as to what is full capacity and what  
13 would be the justification for an additional award/

14 And this is not going to be something that  
15 happens just once or twice. Let's say we go -- I have  
16 Plate C-9, Your Honor.

17 JUDGE SIPPEL: Plate C-9?

18 MR. SEIVER: C-9.

19 JUDGE SIPPEL: I was just taken up with  
20 the loop. C-9?

21 MR. SEIVER: Well, there's also a loop in  
22 C-9 but very often when power poles are constructed,

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1 you'll see a pipe going up the left side from a power  
2 supply. It goes up the left side of the pole and do  
3 you see how it has a little curved head? That's  
4 called a weatherhead. And wires drop out of that.

5 And you see the 40-inch minimum that's  
6 there on the left side?

7 JUDGE SIPPEL: I do.

8 MR. SEIVER: Now what has happened on some  
9 occasions is that the power company puts in these --  
10 they call them risers -- and if, again, that drip loop  
11 drips down, let's say, another two or three inches and  
12 the cable wire is where it is so that there is a 38-  
13 inch difference, boy that's a full pole and we're out  
14 of compliance.

15 And sometimes the actual riser is not kept  
16 all -- taken all the way to the top where it is here  
17 where it stops maybe a foot lower. And then what do  
18 you do? Then you've got to change out the whole pole  
19 to get the foot of space but -- or you could just  
20 cover that wire and move -- put the head up there.

21 And we get into a situation where I think  
22 the FCC said at the last meeting this concept of full

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1 capacity is not a defined term. Insufficient capacity  
2 is an ambiguous term.

3 And we have said you can't say a pole is  
4 at full capacity and you can't take any more and  
5 you're entitled to just compensation unless some  
6 variation on make ready, which would be maybe covering  
7 that wire higher or tightening the drip loops can make  
8 capacity available. Otherwise, there is a five dollar  
9 remedy versus some constitutional remedy.

10 And we'd be spending on a per-pole basis,  
11 which I think is the only way we can go, considerable  
12 time trying to get to a point where I'm not sure Your  
13 Honor could, without expert pole testimony from an  
14 individual that looks at a pole and says this is what  
15 the code is.

16 This is why the pole is or is not out of  
17 compliance. This is what can be done for X dollars to  
18 put it into compliance without changing it out. And  
19 in some instances, can provide a couple of extra feet  
20 of use without putting us in some obligation.

21 JUDGE SIPPEL: All right. Let me -- well  
22 this is very helpful. But let me tell you what I had

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1 in mind and what I have in mind.

2 A survey made sense -- still makes sense  
3 to me as being the logical starting point because  
4 without the survey, nobody knows anything about what  
5 they're dealing with on a first issue basis, on a very  
6 basic basis, that is the number of poles that they  
7 contend are at full capacity.

8 Now if they come up with a survey and they  
9 have an expert that testifies that of these identified  
10 poles that they claim to be at full capacity, they  
11 have an explanation or a justification, an opinion,  
12 you know, based on industry practice or based on  
13 whatever is being done out there, that they have X  
14 numbers.

15 Now maybe there might be some  
16 extrapolation that will have to go into that. I don't  
17 know. But the point is is that you've got a basic --  
18 you have a foundation from which experts can base an  
19 opinion. Without that basis, you can be all over the  
20 lot as, you know, you're showing here.

21 Now, of course, you would have the  
22 opportunity to cross examine with respect to maybe

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1 specific poles or groupings of poles or exemplar poles  
2 with this type of evidence.

3 And then somewhere down the road at the  
4 time of findings, there's got to be a -- both sides  
5 are going to take positions with respect to whether or  
6 not there is going to be just compensation awardable  
7 on whatever the number of poles are.

8 I'm saying an awful lot in a very short  
9 period of time. But it's this -- that's where I'm  
10 trying to get the case to so that I can make a  
11 decision.

12 And how we get there is very important  
13 that we discuss, you know, we hammer that at this  
14 stage of the case. And I think that -- I'm very  
15 impressed so far with what Gulf Power said they are  
16 willing to do.

17 Now having said that, let me -- and I  
18 didn't mean to cut you off on that, where does the  
19 Bureau stand on this?

20 I went back with the transcript and I  
21 found that the Bureau has made some statements that  
22 indicate that you're not altogether sure.

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1 MS. LIEN: Thank you, Your Honor.

2 JUDGE SIPPEL: I'm sorry. This is Ms. --

3 MS. LIEN: Lien.

4 JUDGE SIPPEL: Lien.

5 MS. LIEN: Rhonda Lien, thank you.

6 Your Honor, we are largely in accord with  
7 what you stated. We believe that a pole survey is  
8 necessary at this point because Gulf Power does not  
9 appear to have a good handle on the number of poles  
10 that they are alleging are full.

11 And we also agree that expert testimony  
12 was going to be crucial. As you have been reviewing  
13 the initial description of evidence that came in last  
14 year -- and there were a number of proffers of  
15 evidence from Gulf Power having to do with prior work  
16 that was done on the poles, make ready work.

17 We had to build the pole out because it  
18 was full. We had to replace the pole. Our own, Gulf  
19 Power's own evidence that we couldn't use the pole for  
20 our own higher-valued use because the poles were full.

21 So we want to make certain that the prior  
22 evidence that Gulf Power discussed is also brought in

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1 because the pole survey is going to be basically on a  
2 perspective basis. These are the poles we have now.  
3 We want to make sure that the prior proffers of  
4 evidence are brought in and are fully explained by  
5 Gulf Power.

6 Why Gulf Power believes the make ready  
7 work that occurred in '98, '99, '00, relates to its  
8 ascertainment that the poles were full.

9 JUDGE SIPPEL: Well, you're talking about  
10 -- you mean full capacity at different points in time?  
11 Full capacity at the time that they were making the  
12 allegations back before the case was set for hearing?  
13 And then updating that with a survey?

14 MS. LIEN: Exactly, exactly. There are a  
15 variety of time periods here and I know that's  
16 something that the cable operators have discussed.  
17 It's not certain the exact time periods that we're  
18 dealing with here.

19 But when Gulf Power made this initial  
20 description of evidence, a great deal of the evidence  
21 occurred several years ago. The make ready work, the  
22 testimony about what happened in early 2000. We want

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1 to make sure that evidence comes in and relates to its  
2 testimony.

3 JUDGE SIPPEL: All right. I'm listening  
4 to that.

5 The more immediate question that I had was  
6 with respect to whether or not the Commission has --  
7 whether there has been clear enough definition of full  
8 capacity at this stage of the hearing to go forward  
9 with what we -- to what we know or what we argue on  
10 different sides, what the law is with respect to how  
11 Gulf Power is supposed to meet a standard of proof.

12 MS. LIEN: That's an excellent question,  
13 Your Honor. And I will refer to what my colleague,  
14 Lisa Griffin, said at our last pre-hearing conference.  
15 The Eleventh Circuit case does appear to be rather  
16 nuanced and there does not appear to be prior  
17 Commission decision or language that would give us a  
18 great deal of guidance as far as what full capacity  
19 is.

20 This appears to be somewhat of a new  
21 issue. So no, we do not feel confident that we can  
22 say this standard means full capacity and there is a

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1 possibility for greater compensation.

2 MR. SEIVER: Your Honor, may I?

3 JUDGE SIPPEL: Yes. You see where my  
4 quandary is, though. I don't want to get into having  
5 any of the parties or myself even, you know, running  
6 after a moving target.

7 And I'm not expecting that -- it would be  
8 nice if the parties would but I'm not expecting that  
9 the parties are going to stipulate as to what full  
10 capacity is. So I'm in a position -- well, you see  
11 where I'm at. You see what today's quandary is.  
12 Maybe tomorrow's will be different.

13 MS. LIEN: Exactly.

14 JUDGE SIPPEL: Does anybody want to -- Mr.  
15 Shook, do you want to say anything about that?

16 MR. SHOOK: I'd like to speak to Ms. Lien  
17 first.

18 JUDGE SIPPEL: Please do. Why don't we go  
19 off the record for just a minute.

20 (Whereupon, the foregoing  
21 matter went off the record at  
22 10:26 a.m. and went back on the